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No. 212.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

KNOXVILLE WATER COMPANY,
Plaintiff in Error,

vs.

MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE,
Defendant in Error.

Error to the Supreme Court of Tennessee.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

CHARLES T. CATES, JR.,
For Plaintiff in Error.

HEBER J. MAY,
Of Counsel.

BRANDON-KNOXVILLE

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Supreme Court of the United States.

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KNOXVILLE WATER COMPANY,
Plaintiff in Error,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE,
Defendant in Error.

No. 212.

ERROR TO THE SUPREME COURT OF TENNESSEE.

May it please your Honors:

The plaintiff in error claims the right and power under its charter to contract with both defendant in error and its inhabitants for the use of its water, and to charge therefor such prices as may be agreed upon between the parties, and that not only this right and power, but also contracts and agreements entered into pursuant thereto, are protected by the Constitution of the United States, Article I, Section 10, and Section 1 of the Fourteenth amendment to said Constitution.

The defendant in error claims, under a power to regulate rates, the absolute right to alter existing contracts between both itself and many of its inhabitants and plaintiff in error, and to prevent plaintiff in error from making agreements with the consumers of its water for rates and prices higher than fixed by ordinance of defendant in error enacted arbitrarily and without the consent of plaintiff in error.

The contention of defendant in error was sustained by the judgment of the Supreme Court of Tennessee, and these questions are now, upon a writ of error, before this Court for adjudication.

STATEMENT OF THE CASE.

The defendant in error, the Mayor and Aldermen of the city of Knoxville, is a municipal corporation, and in 1882 it had in effect the same power to provide itself and its inhabitants with a supply of water as set forth in its present charter granted by the General Assembly of Tennessee at its extra session in 1885 and found in sub-section 7 of Section 18 of Chapter 8 of the Acts of the extra session for 1885, as follows:

> "Section 18. The Mayor and Board of Aldermen shall have the following powers by ordinance: . . .
> "Sub-section 7. To provide the city with water by waterworks within or beyond the boundaries of the city, or provide for supplying the city with water otherwise, and to provide for the prevention and extinction of fires, and to organize and establish fire companies."

The plaintiff in error, Knoxville Water Company, is a domestic corporation under the laws of Tennessee, and its charter was issued to it under the Act of the General Assembly of 1877, Chapter 104, Section 1. The provisions of said charter material to the present case are in substance as follows:

> 1. The business of said company shall be to establish and construct waterworks in or near the city of Knoxville, Tennessee, of sufficient capacity to furnish the corporate authorities and inhabitants of said city with water.
> 2. Said company shall have *power . . . to contract with said inhabitants and the corporate authorities of said city, or any incorporated companies, for the use of said water, and charge such price as may be agreed upon between said company and said parties.*
> 3. Nothing in said charter contained shall be construed to compel the inhabitants of said city to use the water of said company or prevent them from using water obtained in any other way.
> *Vide:*
>
> Charter, Rec. pp. 51, 2, 3.
> Acts of 1887, Ch. 104, Appendix No. 1.

Under and by virtue of the authority conferred upon plaintiff in error by its charter as hereinbefore shown and the power in-

vested in defendant in error by its charter as shown, on the first day of July, 1882, an agreement was entered into between plaintiff in error and defendant in error by the terms of which plaintiff in error (to be hereinafter referred to as the Company) in order to supply the defendant in error (to be hereinafter referred to as the City) with water for fire protection and public, sanitary and domestic purposes, stipulated the rates at which it should supply the city with water for such public purposes, and also stipulated in the 7th section of said agreement that *"said company will supply private consumers with water at a rate not to exceed five cents per hundred gallons,* provided, however, it is expressly understood that the entire cost of introducing from the mains into private premises, including cost of meter when used, shall be borne by the parties introducing or ordering the same."

Rec. p. 7.

The company was to maintain waterworks stipulated for and to be built in a condition sufficient to enable it to comply with its undertakings as stipulated for in said agreement for a period of thirty years from January 1, 1883, unless the city should become the owner of said waterworks at the appraised value thereof, at its option, after the expiration of fifteen years.

Rec. p. 10.

And the Water Company was also compelled to obligate itself not to transfer or assign said contract to any company, corporation or individual whatsoever. Rec. p. 11.

The waterworks provided for in said agreement were built thereunder and as therein provided, and it does not appear from this record that the city ever took any steps toward acquiring the plant and property of the company under the option. At the time this contract was entered into the city of Knoxville was composed of its first nine wards as it now exists, and the plant and property of the company in these nine wards were built in pursuance of said contract of July 1, 1882.

Rec. p. 121.

On April 18, 1891, Wheeler & Parks entered into a contract with the town of North Knoxville, then a separate corporate municipality contiguous to the city of Knoxville, to supply said town and its inhabitants with water, and by Section 9 of said contract it was provided as follows:

> ***"Water to be furnished private consumers shall be charged for at not exceeding the rates contained in the following schedule."***

and then follows the schedule in detail.

Rec. pp. 70, 72.

This contract between the town of North Knoxville and Wheeler & Parks, was on November 17, 1893, assigned to the Knoxville Water Company. Rec. pp. 78, 79.

In 1891, the Lonsdale-Beaumont Water Company was chartered under the Acts of the General Assembly of Tennessee for 1885, Chapter 115, for the purpose of supplying water to the town of West Knoxville, which was another separate municipality contiguous to the city of Knoxville.

Charter, Rec. pp. 57 to 61.
Acts of 1885, Ch. 15, Appendix No. 2.

On September 17, 1892, said town of West Knoxville and said Lonsdale-Beaumont Water Company entered into a twenty year contract, under and by which the Lonsdale - Beaumont Water Company agreed to erect and build a system of waterworks sufficient to supply said town and its inhabitants with water, and by Section 11 of said contract it was provided: The grantee *"shall not charge consumers during the continuance of the franchise granted by this ordinance exceeding the following maximum annual rates,"* etc.; and then follows the schedule of rates.

Rec. p. 66.

The power and authority vested in the towns of North and West Knoxville in regard to water supply are set forth in their charters in identically the same language:

"To provide the town with waterworks or contract with others for water within or beyond the town limits, for town or corporate purposes."

Acts of 1889, Ch. 28, Sec. 4, Sub-sec. 7.
Acts of 1899, Ch. 93, Sec. 5, Sub-sec. 7.

By Chapter 323 of the Acts of the General Assembly of 1897, the city of Knoxville and the towns of West Knoxville and North Knoxville were consolidated, and by Section 8 of said Act it was expressly provided that all contracts of the towns of West Knoxville and North Knoxville shall be carried out and performed by the Mayor and Aldermen of the City of Knoxville, which was the corporate name given to the consolidated municipality, which is the defendant in error in this Court.

On February 9, 1888, in order to compromise certain litigation which had been pending between the company and the city relative to hydrant rentals, and which had resulted in a judgment in favor of the company, a *modification of the contract of July 1, 1882, was agreed upon by both parties to said contract, by which the annual rentals for hydrants were materially reduced.*

Rec. pp. 47, 48, 121.

Previous to the consolidation of the three municipalities, as hereinbefore set out, the water company had voluntarily published and put into operation a schedule of rates and charges for the use of water very much below the price stipulated in the contract of July 1, 1882, in that the maximum charge for metered water was fixed at the rate of two and a half cents per one hundred gallons, or twenty-five cents per thousand gallons, as against five cents per one hundred gallons or fifty cents per thousand gallons provided in said contract of July 1, 1882; and further providing as the unit of charge, or as it is sometimes called, the fixture charge, an annual rate of $6 for a house containing four rooms or lesss.

Rec. pp. 87, 91.

Subsequent to the publication of this schedule of rates and charges, and on the 17th day of May, 1897, the City of Knoxville

passed an ordinance assuming to regulate meter rates to be charged by the water company, *but in fact only adopting the meter rates then in force by the water company.*

Rec. pp. 49, 50.

By the Act of Consolidation, the town of West Knoxville became the Tenth Ward, and the town of North Knoxville became the Eleventh Ward of the City of Knoxville.

Acts of 1887, Chapter 323.

On the 20th day of October, 1899, the defendant in error, Mayor and Aldermen of the City of Knoxville, passed an ordinance granting its corporate assent and approval to the consolidation of the Knoxville Water Company, then doing business in the first nine wards and the eleventh ward of the City of Knoxville, and the Lonsdale-Beaumont Water Company, then doing business in the tenth ward of the City of Knoxville, into one corporation under the name of the KNOXVILLE WATER COMPANY, to be effected by consolidation, purchase, lease or otherwise; but this consolidation was granted upon certain express conditions reserved by the City, to-wit:

1. The rates provided by the Lonsdale-Beaumont contract of September 17, 1892, were guaranteed to the inhabitants of the Tenth Ward, formerly the town of West Knoxville.

2. Filtered water to all the inhabitants of the City of Knoxville.

3. A continuance of the rates then in force by the Knoxville Water Company to all the inhabitants of the remaining wards other than the Tenth Ward of the City of Knoxville.

4. The option and right to purchase reserved by the city in its contract of July 1, 1882, with the Knoxville Water Company, and covering only the property of said Company, should be extended to all the property of the Knoxville Water Company which it then owned or might afterwards acquire, or which might be acquired by said consolidated company.

Rec. pp. 13, 14.

The Knoxville Water Company accepted the obligations imposed upon it by this ordinance of October 20, 1899, and the same thereupon became a part of the contracts existing between the Company and the City as fully as if the provisions of said ordinance were embraced in formally written contracts executed by and between said City and said Company.

Rec. pp. 15, 16.

On January 1, 1900, the consolidation provided by the ordinance and contract of October 20, 1899, was effected by a conveyance by the Lonsdale-Beaumont Water Company, of all its property, franchises, contracts, etc., to the Knoxville Water Company, and this conveyance was duly recorded in the office of the Secretary of State, as provided by law. Rec. pp. 80--84.

On July 27, 1900, and *less than a year after the execution of the contract and passage of the ordinance of October 20, 1899, the City of Knoxville, for the first time since the execution of the contract of July 1, 1882, arbitrarily, and without the consent of the* ***Water Company,*** attempted to pass an ordinance regulating water rates and charges to be enforced by the water company, and materially lowering the same, but this ordinance was conceded to have been defective, and is only noticed because it was in substance re-enacted and the defects therein contained remedied.

Rec. pp. 113--117.

On March 30, 1901, an ordinance was passed in lieu of, or as an amendment to, the aforesaid ordinance of July 27, 1900, but in substantially the same terms, regulating and fixing the rates to be charged consumers of water. Rec. pp. 19--23.

By this ordinance of March 30, 1901, the rates were materially changed and decreased from those then being enforced by the Knoxville Water Company under the contract of July 1, 1882, and the ordinance contract of October 20, 1899. This is undisputed. And by Section 3 of said ordinance, it was provided as follows:

Section 3. *Be it further ordained,* That it shall be unlawful for any person, company, firm or corporation, or their officers, agents, servants or employees, supplying water to the inhabitants of the city of Knoxville, to charge, demand or collect for water so supplied more than the rates hereinbefore set forth in Section "1" of this ordinance; and it shall also be unlawful for any such person, company, firm or corporation, or their officers, agents, servants, or employees to cut off or otherwise interfere with the supply, or refuse to furnish a supply of water to any consumer for failure to pay for same, provided such consumer tenders, in lawful money, the charge for such water at the rates aforesaid, and any violation of the provisions of this section of this ordinance shall be a misdemeanor, and upon a conviction thereof before the Recorder the offender *shall be punished by a fine of not less than* $10 *nor more than* $50 *for each offense."*

THIS IS THE ORDINANCE UPON WHICH THE QUESTIONS TO BE DECIDED IN THIS CASE ARE PRESENTED.

The ordinance was published under the direction of the city authorities, in the *Knoxville Journal and Tribune,* in its issue of Sunday, March 31, 1901. Rec. p. 23.

It was claimed in the trial court, and also on appeal, that inasmuch as publication was necessary to make the ordinance valid and to put it in force, that its publication in the Sunday newspaper was illegal, and therefore that the ordinance was invalid and not in force. It was shown to be the object of the city authorities to have the ordinance go into effect before April 1st, in order to have the change and reduction in water rates go into force on or before that date, inasmuch as all water bills due the Company were payable quarterly in advance on the first days of January, April, July and October. Rec. p. 94.

Section 7 of the charter of the City (Section 7 of Chapter 8 of the Acts of 1885, extra session) provides that the Board of Mayor and Aldermen shall hold meetings at such times as it may deter-

mine, not to exceed *two regular meetings per month;* and the regular meetings provided for were on the first and third Friday nights of each month. It is further provided in the charter of the City, Section 9, that "no bill or ordinance shall become a law without first having been read and passed at three several meetings by a majority vote, on the third of which readings a majority of the whole number of the members of the Board shall be required." And further, that the Mayor, "whenever in his judgment the good of the city requires it, may call special meetings of the Board of Aldermen, and when so called, he shall state, by message, the object for which it shall have been called, and the business of such meeting shall be restricted to the object so stated."

The ordinance in question was introduced at a special meeting on March 9, 1901, and as three readings were required, each reading at a separate meeting of the council, it followed that it would be necessary to hold special meetings in order to pass the ordinance before April 1, 1901, and therefore special meetings were held, not only on March 9th, but also on March 30th, at which the ordinance was passed on its third and final reading; and it was passed on its second reading at the regular meeting on March 15, 1901.

Rec. pp. 38, 39, 40.

The Board of Aldermen was composed of one alderman from each of the eleven wards of the city, and no notice of the special meeting of March 9, 1901, was given to Aldermen Aiken, Trigg, and Cleage, but only Trigg and Cleage were absent from the meeting, the former having resigned and removed from the city.

Rec. p. 97.

No notice of the special meeting of March 30, 1901, was given to Alderman Cleage, and no attempt was made to notify him. He was temporarily out of the city at the date of both the special meetings, which were called only a few hours before the meetings were held.

Rec. pp. 98, 110, 211, 215.

He was engaged during the month of March and on March 9th and 30th, in his work as Law Agent for the Southern Railway Company, in the State of North Carolina.

Rec. p. 110.

The Knoxville Water Company, the plaintiff in error here, being advised that said ordinance of March 30, 1901, had never been passed in such manner as to make it a valid ordinance of the City of Knoxville, and being further advised that even if said ordinance was in form and manner of passage a valid ordinance, that it was void because in contravention of the Constitution of the United States, Article I, Section 10, and of the first section of the Fourteenth Amendment to said Constitution, continued to charge its consumers the rates provided in the contract and ordinance of October 20, 1899, which (with the exception of some of the rates in the Lonsdale-Beaumont contract) were slightly in excess of the rates and charges provided in said ordinance of March 30, 1901.

Rec. p. 209.

Thereupon, the City of Knoxville, defendant in error here, for the purpose of enforcing said ordinance of March 30, 1901, brought suit on the first day of May, 1901, in the name of the Mayor and Aldermen, by warrant issued by its Recorder, against the Knoxville Water Company, plaintiff in error here, by which suit it sought to collect a penalty of "not less than $10 nor more than $50" for charging, demanding and collecting from one *W. K. McClure* for water furnished and to be furnished him, more than the rates fixed therefor by the ordinance of said City passed and approved on March 31, 1901, as aforesaid.

Rec. pp. 1, 2.

The Water Company was arrested, and upon its plea of not guilty the Recorder of defendant found said Company guilty as charged and imposed a fine or penalty of fifty dollars to be paid into the treasury of the City, together with costs of the cause, in default of which it was adjudged that the Water Company be

committed to the workhouse until said fine and costs were paid. An appeal was prayed and granted.

Rec. p. 2.

The *W. K. McClure* mentioned in said Recorder's warrant was the agent for a man by the name of *J. S. Gratz,* who then lived in the city of Chicago, but was the owner of three houses and lots in the city of Knoxville and outside of the Tenth Ward. In 1896 the Water Company made a contract with said Gratz to supply water to the premises owned by him, which said contract is as follows:

"KNOXVILLE WATER COMPANY, Service No. 2850.
KNOXVILLE, TENNESSEE, September 17, 1896.

The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises No. 706 High Street, owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules and regulations of the Knoxville Water Company as now or hereafter in force, and which are made a part of this contract.

And I further agree that said Company may enter upon any land owned by me and in which I may have such right, and place therein, upon the terms provided therefor, all the pipes that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require.

J. S. GRATZ, *Owner,*
By W. K. MCCLURE, *Applicant.*"

Rec. pp. 25--126.

The Water Company has about 4,000 individual consumers or patrons with whom it has contracts similar to said Gratz contract above set out, and to whom said company was engaged in furnishing water under the rates provided in said ordinance-contract of October 20, 1899. Rec. p. 126.

It is not improper to state here that the total amount of the water bills for the three premises in dispute for the quarter beginning April 1, 1901, and ending June 30, 1901, was $7.27 (Rec. p. 86), and that the difference between the rates charged by the

Water Company on these three Gratz premises in accordance with the terms of its contracts of July 1, 1882, on October 20, 1899, and the ordinance of March 30, 1901, was $1.15; that is, 50 cents, 42 cents and 23 cents. These rates for water, while rendered to *McClure* as agent for *Gratz*, were in fact paid out of funds belonging to *Gratz*. Rec. pp. 86, 87, 210.

On appeal in the Circuit Court of Knox County the Company pleaded not guilty; and also by way of special pleas averred that the ordinance of March 30, 1901, was void, because it violated the Constitution of the United States in that it impaired the obligations of the contracts between the City and the Water Company, and also because it deprived said Company of its property and liberty without due process of law. The other special pleas relate to the oppressiveness and unreasonableness of the provisions of the ordinance, to its interference with the existing contracts between said company and its patrons, to the excessiveness of the penalty to be assessed, and to the denial that the company owed the City, as alleged in the warrant. Rec. pp. 3, 5.

The case was brought to trial in the Circuit Court without a jury, and the Court having made a special finding (Rec. pp. 120 to 126) dismissed the suit, thereby disagreeing with the City Recorder. A motion for a new trial was overruled, and a writ of error allowed to the Supreme Court of the State.

Rec. p. 18.

The bill of exceptions is found in the record from pages 19 to 126.

In the Supreme Court of Tennessee the Water Company also raised the Federal questions by its reply to the assignments of error filed on behalf of the City and also relied upon the other questions raised by it in the Circuit Court and there decided in its favor. Rec. pp. 138, 139.

The Supreme Court of Tennessee delivered its opinion (Rec. pp. 209, et seq.) by which it reversed the judgment of the Circuit

Court, holding in effect (1) that the ordinance in question had been legally passed and published; (2) that the power to regulate was a police power which the City could not contract away; (3) that the City had a continuing right to regulate charges for water notwithstanding the contracts and agreements of itself and its inhabitants with the Water Company.

Rec. pp. 216, 227, 228.

This conclusion with respect to the police power and right to regulate was reached by construing Section 2 of Chapter 104 of the Acts of 1877 to mean that by Section 1 of that Act no power was granted to the Water Company to enter into any contract or agreement either with the City or its inhabitants as to water rates which should interfere with the police power of the City or not be at all times subject to regulation by the City.

Rec. pp. 219, 227, 228.

It is proper to here call the attention of the Court to the fact that the Supreme Court of Tennessee (Rec. p. 227) erroneously ascribes the "power to regulate" to the charter of the City of Knoxville, when it is not even contended that such power is contained in said charter—the only claim being that it is conferred by Section 2 of Chapter 104 of the Acts of 1877.

The question as to whether the ordinance of March 30, 1901, was reasonable or unreasonable was not even considered by the Supreme Court of Tennessee.

Opinion, Rec. pp. 221–227.
Final Judgment, Rec. p. 230.

The Federal questions relied upon in this Court were expressly passed upon and decided both in the opinion and judgment of the Supreme Court of Tennessee adversely to the Water Company.

Rec. pp. 225, 229.

The Water Company sued out a writ of error from this Court, and has again raised the Federal questions by its assignments of error.

Rec. p. 230.

ASSIGNMENT OF ERRORS.

1. That said ordinance of March 30, 1901, is invalid and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that plaintiff in error is deprived of its property and liberty without due process of law.

2. That said ordinance is also in contravention of Article I, Section 10, of the Constitution of the United States, in that it violates and impairs the obligations of the contracts existing between plaintiff in error and defendant in error and its inhabitants.

3. The Supreme Court of Tennessee erred in its holding that said ordinance was not in contravention of the Constitutional guaranties contained in Section 10 of Article I of the Constitution of the United States, and in Section 1 of the Fourteenth Amendment to said Constitution.

4. The Supreme Court of Tennessee erred in not holding that said ordinance and the powers sought to be exercised thereunder were in violation of the constitutional guaranties contained in said Constitution and said Amendment thereto.

BRIEF AND ARGUMENT.

From the foregoing statement of facts and errors assigned it will be observed that there are two Federal questions presented on the record for determination by this Court, viz.:

1. The question as to the invalidity of the ordinance of March 30, 1901, and as to whether its enforcement has deprived the Knoxville Water Company of its property and liberty without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution.

2. The question as to whether said ordinance, provided it shall be held to be valid, has impaired the obligations of the contracts entered into on the first day of July, 1882, and the 20th day of October, 1899, between said Water Company and the authorities of the City of Knoxville, and whether said ordinance impairs the obligations of the contract entered into between said Water Company and J. S. Gratz on the 17th day of September, 1896, in violation and contravention of Section 10 of Article I of the Constitution.

I.

AS TO DUE PROCESS OF LAW.

First.—Was the ordinance of March 30th, 1901, void by reason of the manner of its passage.

It could not become a valid ordinance under the provisions of the charter of the City of Knoxville without first having been read and passed at three several meetings of the Board of Mayor and Aldermen, that is, at three several regular meetings, or at three regular and valid "called" or "special" meetings, the Mayor having authority to call such special meetings. What are the facts relative to the passage of said ordinance? On the trial of this cause in the Circuit Court, upon the demand of the City the Cir-

cuit Judge made a special finding of facts which, with respect to the manner of passage of said ordinance, is as follows:

"In regard to the passage at special meetings, I find the following to be the facts:

"The regular meetings of the Board of Mayor and Aldermen of the city of Knoxville are on the first and third Fridays of each month, but under the charter of the city of Knoxville the Mayor has power to call special meetings of the Board of Aldermen. The ordinance upon which this suit is based was passed on its first reading on March 9th, at a special meeting of the council; on its second reading on March 15th at a regular meeting of the council; and on its third reading on Saturday, March 30th, at a special meeting of the council, and it was published on Sunday, March 31st, in the *Knoxville Journal and Tribune*, a daily newspaper published in the city of Knoxville; that newspapers in Knoxville, Tennessee, have been issuing regularly since 1866 Sunday editions or issues; that these Sunday editions are as large if not larger than any editions during week days.

"The said meeting of March 30, 1901, was in pursuance of a call of that date purporting to be signed by the Mayor of the city of Knoxville, S. G. Heiskell, but in fact the name of the Mayor in said call was signed by J. J. Atkins, chief of police of the city of Knoxville, who was instructed so to do by the Mayor, but the Mayor did not in fact see this call until it was read at the meeting of the council. The special meeting of March 9, 1901, was held in pursuance *to* a written call of same date signed by the Mayor, which, however, does not state the place of meeting. No notice of the meeting of March 9, 1901, was given to Aldermen Cleage, Trigg and Aiken, but Alderman Aiken attended the meeting, and no notice was given Alderman Cleage of the meeting of March 30, 1901; in regard to Alderman Trigg, it was not necessary for him to have notice, because he had tendered his resignation to John E. McMillan, Deputy Comptroller of the city of Knoxville, from four to six weeks prior to the time it is dated on March 15, 1901, when it was accepted by the council, and Alderman Kephart elected in his stead, and for some time previous to the meeting of March 9, 1901, said Trigg had abandoned and vacated his office by removing from the city of Knoxville to the city of Washington, in the District of Columbia, changing his residence and moving his family there, and was not entitled to notice. Alderman S. E. Cleage, who represented the 6th ward of the city of Knoxville,

was an active alderman in the discharge of his duties, and had neither abandoned his office nor resigned the same. At the time of his election as an alderman of the city of Knoxville, and on March 9, 1901, and March 30, 1901, he was in the employ of the Southern Railway Company, as law agent, with his headquarters at Asheville, in the State of North Carolina, and transacted his business principally in the States of North and South Carolina, and outside the limits of the State, his territory including about 500 miles of railroad. That his duties required him to go in person over his territory, investigating, report and adjusting claims for damages against said R. R. Co. That during the months of February, March and April, he was more than usually busy in the discharge of his duties, but retained his home in the 6th ward of the city of Knoxville and was active in the discharge of his duties as an alderman; that he attended nearly all of the regular meetings of the council and nearly all of the special meetings of which he had notice; that it was impracticable for him to have been present on March 30, 1901, at the special meeting on that date, but it was not impracticable to have given him notice of that meeting; that it was not impracticable to have given him notice of the special meeting on March 9, 1901, but it does not appear that it was impracticable for him to have attended that meeting; that there was no emergency for this ordinance to be considered at special meetings of March 9, 1901, and March 30, 1901. It was the duty of the municipal authorities to inform Alderman Cleage of the special meetings of March 9th and 30th, and as a public servant and official he had a right to have notice of these meetings, but notice was not given him, and therefore this ordinance of March 30, 1901 is invalid."

Rec. pp. 124, 125.

This finding of facts was not in any material respect changed by the findings and opinion of the Supreme Court.

Rec. pp. 211, 215.

The Supreme Court, however, does add a finding which was in strict accord with the facts, that Alderman Cleage, who was not present at either of the special meetings, was not only not notified, *but that no attempt was made to notify him* (Rec. p. 211), and that the special meetings which he failed to attend were called

(Rec. p. 215) during the evening and but a few hours before the special meetings were actually had.

What was the law in Tennessee with respect to special meetings of a municipal council at the date of the passage of the said ordinance of March 30, 1901? It was clear and well understood to be as set forth in the Opinion of the Supreme Court of Tennessee, as follows:

> "The result of the authorities upon the subject is that, as a general rule, every member of the municipal council is entitled to reasonable notice of special meetings, and that no action can be lawfully taken at such meetings unless such notice has been given, or unless the members not notified actually attend and participate in the business of the meeting. Land Co. *vs.* Jellico, 103 Tenn., 320."

This declaration of the Supreme Court of Tennessee is in strict accord with the rule upon the subject as expressed both in the text-books and the decisions of other Courts. But in this case the Supreme Court of Tennessee, upon the facts above set out, and in the face of the rule announced by it in Land Co. *vs.* Jellico, *supra*, only two years before, turns this point in favor of the validity of the ordinance by reaching the following conclusion, which expresses not a finding of fact but is purely an opinion of law upon facts practically undisputed:

> "We are of the opinion that when a member of the council . . . is continuously absent from the State, and when he is shown to have been absent from the State and beyond reach on the occasion and at the time of the call, as appears in this case, it is not *legally practicable* to give him notice of called meetings."
>
> Rec. p. 216.

When the actual and undisputed facts of this case are considered, we think it clear that this holding of the Court is not in accord with such facts, because (1) it was *legally practicable* to have given Cleage notice of the special meetings, if not personally, then by leaving such notice with his family, or usual place of residence, which was in the ward he represented in Knoxville. (Beach on

Pub. Corp., Sec. 265.) (2) Cleage was not continuously absent from the State in such manner as to neglect his official duties, for he attended the meetings of the Board regularly and promptly, and was present (Rec. pp. 107--111) at both of the regular meetings in March, 1901, notwithstanding the claim that his business as law agent in North Carolina was of such a character as to require all of his time and attention; (3) there was no emergency for the ordinance to be considered at the special meetings of March 9, and 30, 1901, upon a few hours' notice, and the action in calling the meetings under the circumstances was not reasonable on the part of the Mayor; there most assuredly was no emergency for the called meeting of March 9th; ample notice could and should have been given of this meeting; whether the fact that the Mayor allowed the last meeting at which the ordinance could be passed to elapse until March 30th, so that he had to call the special meeting on a few hours' notice in order to pass it and publish it before April 1st, raises a question as to the neglect of the Mayor rather than one of emergency, especially when the evidence shows that he could have given many days' notice of the special meetings just as easily as he gave a few hours' notice; Cleage could have been notified personally of the first special meeting during his attendance at the regular meeting on March 1st, and of the second special meeting when he attended the regular meeting of March 15th, but he was allowed to depart without notice. We submit that an emergency cannot be created by the neglect or action of the Mayor as in this case by which the rules and formalities of law may be set aside, but the emergency must really exist independently of neglect on the part of the official charged with the duty of calling a special meeting. When the surroundings of this case are considered there was no such emergency in existence as required the Mayor to call the special meetings at unreasonable times and upon unreasonable notice which did not (Rec. p. 38) state the place where said meeting was to be held on March 9, 1901. The general rule, as shown by Land Co. *vs.* Jellico, *supra,* is that reasonable notice

of both the time and place of special meetings of municipal bodies must be given to all the members of that body, and this rule is supported by reasons of public policy and is upheld by an almost unbroken line of authorities. The Supreme Court of Tennessee in this case recognized these authorities, but attempted to distinguish this case and take it out of the rule by an erroneous view or construction of certain undisputed facts as applied to what is called in the opinion (Rec. pp. 211--216) *legal practicability* of giving notice of special meetings.

In Dillon on Municipal Corporations (4th Ed.), Sec. 256, it is said: "If a meeting be a special one, the general rule is, unless modified by the charter or statute, that notice is necessary and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote."

And in Section 263 Mr. Dillon further says:

> "Nor is this merely an arbitrary rule, but founded upon the clearest dictates of reason and public policy. Any other rule would be fraught with danger to the rights of even a majority as when legally convened, the rule, in the absence of special restrictions being that a quorum can act, and the majority of the body being a quorum, it would but for this rule often be in the power of an unscrupulous minority to bind both the body and the corporation for which it acts for measures which neither approve. Thus with the body composed of twelve members a quorum of seven could act, and a majority of four, by withholding notice to five, might thus bind both the body and the corporation. Reason, therefore, and authority unite in saying that notice to all the members is necessary to a legal special session.

Again, he says:

> "Notice may be altogether dispensed with or its necessity waived by the presence and consent of every one of those entitled to it. It must be served personally upon every resident member or left at his house. If temporarily absent it may be left with his family or at his house or last place of abode; an order to serve all is not sufficient. All, if practicable, must be served, but if the party entitled to

notice has entirely quit the municipality and has no family or home within its limits, notice is not necessary."

And at Section 264 of the same authority, it is said:

"Such great importance is attached to notice that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting or at a special meeting, they may, if every one consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or insufficient notice, but the unanimity of consent should clearly appear from their recorded declarations, acts or conduct. . . . If the charter imperatively requires a special notice, it cannot be waived even by the consent of all."

In 1 Beach on Public Corporations, Sec. 265, it is said:

"When a meeting is assembled for a special purpose, every member who has a right to vote is entitled to notice unless he has quit the municipality without retaining a home or leaving his family within its limits. . . . It must be personally served upon him, but in case of his temporary absence it may be left with his family or at his last place of abode."

Chief Justice Tilghman, in the case of Balt. Turnpike (5 Benny, 481), said: "That when several persons are authorized to do an act of a public nature they must all be notified or convened."

In Wilcox on Municipal Corporations we find it laid down that all corporate affairs must be transacted at an assembly convened upon due notice at a proper time and place.

In Paola *vs.* Commissioners, 16 Ks., 302, holding that the doings of a Board of County Commissioners at a special meeting were invalid because all members were not notified, Mr. Justice Brewer said:

"*And there is but one uniform rule running through the authorities.* In the case of Rex *vs.* Mayor, etc., of Shrewsberry, Rep. Temp. Hard., 151, it was said by the Court that 'when the acts are to be done by a selected board notice must be given of the time of special meeting.' It was a saying of Lord Kenyon's that special notice must be given to every member who has a right to vote."

In Angel & Ames on Corporations, Sections 492-494, it is laid down:

> "Usage and custom will not justify either the lack of notice or unreasonable notice to members of a municipal corporation. In the case of absence, notice must be left with the members of the family or his place of abode. It is no sufficient reason for omitting to summon a member that it was supposed that he was without the reach of summons, for to support the validity of corporate acts each member must be actually summoned."

Without making further quotations, it is respectfully submitted that the authorities support the rule contended for by plaintiff in error. The following additional authorities also support the rule contended for by plaintiff in error.

15 Am. & Eng. Ency. Law (1 Ed.), pp. 1035, 1080, 1081.
7 Am. & Eng. Ency. of Law (2 Ed.), p. 679, Note 2.
2 Cook on Corp., Secs. 594, 596.
Lord *vs.* Anoka, 36 Minn., 176.
Beaver Creek *vs.* Hastings, 56 Mich., 528.
Board of Supervisors *vs.* Horton, 75 Ia., 371.
People *vs.* Bachellor, 22 N. Y., 128.
Harding *vs.* Vandeater, 40 Cal., 77.
Stow *vs.* Wise, 7 Conn., 214.
Med. Society *vs.* Weatherly, 75 Ala., 248.
Band of Little Rock *vs.* McCarthy, 53 Ark., 473.
Wiggins *vs.* Free Will Bapt. Ch., 8 Mass., 301.

Second.—The ordinance of March 30, 1901, is unreasonable, oppressive, and deprives the Water Company of its property and liberty without due process of law.

The question of the reasonableness or unreasonableness of the ordinance of March 30th, 1901, was not considered by the Court (Rec. pp. 221, 227), and by the judgment of the Court (Rec. p. 230) the Water Company was remitted, without prejudice, to another remedy, "to litigate and show" whether said

rates are unreasonable; but standing upon the presumption in favor of the reasonableness of the rates then being enforced by the Water Company under the ordinance-contract of October 20th, 1899, it is not our purpose to go into a consideration of the rates prescribed by the ordinance in question, except as said ordinance lowers and alters rates agreed upon between the parties and operates upon conditions existing under and produced by the contracts between the parties.

By the contract of July 1, 1882 (Rec. p. 10), the City acquired the right to purchase the property of the Water Company. At this time, the City of Knoxville comprised only the first nine wards of the city as it now exists, and within these wards was situated the property of the Water Company. Afterward the Water Company acquired the North Knoxville water plant, and later on, and subsequent to the consolidation of the three municipalities, the Knoxville Water Company desired to acquire the plant and property of the Lonsdale-Beaumont Water Company, then being operated in the tenth ward of the City of Knoxville, formerly the town of West Knoxville, but before this consolidation could be accomplished either by merger or purchase, it was necessary, under the laws of Tennessee (Chap. 166 of the Acts of 1899) to obtain the consent of the city. Thereupon, on October 20, 1899, the City of Knoxville, by ordinance, gave its consent to the proposed consolidation, but in the same ordinance *extended its right of purchase* to cover all the property which the Water Company then owned or might thereafter acquire (sec. 4, Rec. p. 14), and also required the Water Company to bind itself to furnish water to the city and its inhabitants at a maximum rate not exceeding that fixed by the Lonsdale-Beaumont contract as applied to the inhabitants of the tenth ward of the City and as applied to the inhabitants of the remaining wards at a maximum rate not exceeding that fixed by the contract of July 1st, 1882, and the schedule of rates and charges then in force and operation by the Water Company, which was the schedule adopt-

ed by the Water Company on April 1st, 1895 (Rec. p. 14); and, by Section 6 of said ordinance, required the Water Company to file its written acceptance of said ordinance in so far as it altered or changed the contracts then existing between the City and the Water Company. We do not deem it necessary to point out or argue that the agreement as to the rate or price of water is one of the most material elements of any contract governing a supply of that commodity either to the city or its inhabitants. The income of the Water Company is necessarily dependent upon the revenues collected from its patrons. In the case at bar it is shown that the Water Company had agreed not only with the City as to the price or rate governing the supply to it, but had also agreed with the City as to the rate or price at which it would supply water to the inhabitants of the City. In addition to this the Water Company had entered into written agreements similar to that with Gratz appearing in the record with more than four thousand of its consumers (Rec. p. 86), to whom, as well as to the city, it was furnishing water under the schedule rates adopted and reaffirmed by the ordinance-contract of October 20th, 1899. Rec. pp. 85, 126.

If plaintiff is permitted to arbitrarily reduce these rates and charges, that is, the rates and charges provided for in said contract of October 20, 1899, which are presumed to be reasonable and just, it can and does arbitrarily reduce and impair the value of the Water Company's property, which it may be anxious to buy upon an appraisal under the contract of July 1st, 1882, and it can also arbitrarily, and by said ordinance of March 30th, 1901, does arbitrarily, undertake to reduce the amounts which it has agreed to pay the Water Company for its water, because it is shown in the proof (Rec. p. 85) and the special findings of the trial judge (Rec. p. 126) that the City does take water outside of the free uses and hydrant rentals, and has been paying therefor according to the schedule reaffirmed and adopted on

October 20th, 1899. Further, under its charter (Rec. p. 51, and Appendix No. 1) the Water Company is given not only the right to contract with the City and its inhabitants for a supply of water, but is expressly given the right *"to charge such prices for the same as may be agreed upon between said Water Company and said parties."* This right it has exercised not only with the City, but with more than four thousand of its consumers; and it is not improper here to point out that, notwithstanding the crusade against the Water Company inaugurated by the City authorities in July, 1900, by the passage of the ordinance of July 27, 1900, and continuing and resulting in the passage of the ordinance of March 30th, 1901, and although the Water Company has more than four thousand consumers, yet less than two per cent (Rec. p. 86) of said consumers have sought to take advantage of the ordinance in question and pay their water bills under protest.

This right to contract, and agree upon prices for water as an essential element of said right, is not in conflict with the city's claim of "power to regulate," but is property and *liberty* within the meaning of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States. In Bank *vs.* Devine, 97 Tenn., 604, the Supreme Court of Tennessee, through its Chief Justice, upheld and sustained the right to contract as being one to be enjoyed to the fullest extent and perfection, and one of the objects of the Constitution was to preserve and protect this right.

Stratton Clamants *vs.* Morris Clamants, 89 Tenn., 497.

And so it has been held by this Court.

Williams *vs.* Fears, 179 U. S., 274.

By *"due process of law,"* which is synonymous with "the law of the land," is intended "that general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial." By it is meant the natural and inherent prin-

ciples of justice, and it forbids that one man's property or right to property shall be taken for the benefit of another or for the State without compensation, and that no one shall be condemned in his person or property or be deprived of his liberty without in proper form being heard in his own defense.

Holden *vs.* Hardy, 169 U. S., 390, 391.
L. & N. R. R. Co. *vs.* Schmidt, 177 U. S., 230.
Brannon on the Fourteenth Amendment, 140 *et seq.*

Third.—By the ordinance of March 30, 1901, the City is made the judge of its own case.

Even though the City has the power to regulate rates, that power must be exercised in a reasonable and constitutional manner. Therefore, the question arises whether the Legislature of Tennessee could constitutionally delegate to the City the power to fix prices at which water should be sold to the authorities of the City, itself a consumer, and to its inhabitants, without some provision for judicial investigation of the reasonableness of the rates sought to be fixed by such authorities. In Cleveland Gas Light & Coke Company *vs.* the City of Cleveland, Mr. Justice Jackson said:

> "It would be a fearful proposition—monstrously absurd and outrageous—if the Legislature which undertook to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The City of Cleveland has undertaken to do that thing . . . The thing cannot be done, and ought not to be done."
>
> 71 Fed. Rep. 614.

In Agua Pura *vs.* Las Vegas (N. M.), the Court quoted approvingly the language of Justice Jackson and held that the action of the City authorities in attempting to fix rates and to

enforce their acceptance by a penal ordinance, without making any provision for judicial investigation of the reasonableness of the rates, was invalid and void, and in contravention of the Fourteenth Amendment to the Constitution of the United States.

90 L. R. A. 819

II.

DID THE ORDINANCE OF MARCH 30, IMPAIR THE OBLIGATION OF THE CONTRACT BETWEEN THE CITY OF KNOXVILLE AND THE KNOXVILLE WATER COMPANY OF JULY 1, 1882, AS EXTENDED AND REAFFIRMED BY THE ORDINANCE OF OCTOBER 20, 1899, BY CONSENT OF THE PARTIES THERETO?

We respectfully but confidently insist that this question must be answered in the affirmative, and relying on, without reviewing all of, the authorities cited in the brief on behalf of the Water Company before the Supreme Court of the State, and found in the printed record between pages 198 and 206, we submit the following:

First.—Was there power in the City to contract with the Water Company for supply of water to itself and its inhabitants?

The charter of the City, as hereinbefore shown, contained the following provision:

> "The Mayor and Aldermen of Knoxville shall have the following power: . . .
>
> "Sub-section 7. To provide the City with water by waterworks within or beyond the boundaries of the city, *or provide for supplying the city with water otherwise*, and to provide for the prevention and extinction of fires, and to organize and establish fire companies."

Under this authority it was fully competent for the City to contract with the Water Company for a supply of water for itself

and its inhabitants. We take it that this proposition will not be seriously disputed. Further, the exercise of such power, in contracting for waterworks to supply itself and its inhabitants with water, is not exercising its governmental or legislative functions, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a benefit for the City itself and its inhabitants.

Ill. Tr. & Sav. Bank *vs.* Arkansas City, 76 Fed. Rep., 271.
1 Dillon, Municipal Corps., Sec. 27.
Cincinnati *vs.* Cameron, 33 O. St., 336, 367.
Safety Insul. Wire Co. *vs.* Baltimore, 13 C. C. A., 375, 378.
Cunningham *vs.* City of Cleveland, 98 Fed. Rep., 657, 663.

Second.—Was there a contract between the City and the Water Company by which the rates or prices for water were agreed upon?

That there was such a contract cannot be questioned. In the paper itself it is so referred to. It is called by the City, "Articles of Agreement" (Rec. p. 5), and in a resolution passed by the City Council on February 8, 1888, it is referred to as a "*contract*" made . . . on the first day of July, 1882." (Rec. p. 47.) In the ordinance-contract of October 20, 1899, it was amended and referred to as the "contract existing between the City of Knoxville and the Knoxville Water Company dated July 1, 1882." (Rec. pp. 14, 15.) It is referred to in the opinion of the Supreme Court as an agreement and contract. (Rec. pp. 209, 219, 220.)

The subject-matter of the contract was within the powers of the City to make; the terms were explicitly set forth and the considerations definitely defined. Both the "agreement" of July

1, 1882, and the ordinance-contract of October 20, 1899, contain all the essential elements of a valid contract.

Vicksburg Waterworks Co. *vs.* Vicksburg, 185 U. S., 65-80.

Third.—Under its contracts with the City, the Water Company is exempt from further regulation of the rates fixed by said contracts.

Before approaching the consideration of said contracts, in order to ascertain their proper and legal construction under the charter of the Water Company, and the power to regulate rates vested in the City, it is not improper to state, as we understand it, the scope of the duty which devolves upon this Court in determining whether there was a contract, and if so, the construction to be given it. We assume that it will be insisted on behalf of the City that the construction placed upon the charter of the Water Company and the power conferred upon the City by the second section of the Act of 1877 by the Supreme Court of the State, will be binding upon this Court; but we do not understand that such is the rule of this Court. We understand that this Court will form an independent judgment as to both the existence of the contract and its proper construction, and that if in the "exercise of the independent judgment of this Court the existence or nature of the contract becomes 'balanced in doubt' such doubt will be resolved in favor of the construction given to the State statute by the court of last resort of the State," but because the State Court has construed the statute against the contract is not sufficient to raise a doubt against it or the construction contended for, and does not cause the question to be "balanced in doubt." "If the rule did so imply," to quote the language of Mr. Justice White, "it would follow that in every case where a right arose from a State statute and the court below held there was no contract the review of that question in this

court would be wholly nugatory, since the decision below would engender the doubt, and where doubt arose the decision of the State Court would have to be followed. The rule, then, to be applied when the matter is balanced in doubt, is this and nothing more, that if in using its independent judgment, as it is its duty to do, a serious doubt arises in the mind of the court, then the interpretation by the State Court, acting upon a serious doubt created by the exercise of independent judgment, will cause such doubt to preponderate in favor of a construction given by the State Court to its own statute."

Freeport Water Co. *vs.* Freeport City, 180 U. S., 610, 611.

Board of Liquidation *vs.* Louisiana, 179 U. S., 622, 638.

It is true that this quotation from the Freeport case is from the dissenting opinion of Mr. Justice White, but the rule as announced is in harmony with and based the opinion of the Court in Board of Liquidation *vs.* Louisiana, *supra.*

Further, we submit that to the extent that the judgment of the Supreme Court of Tennessee may have been based upon its opinion that the power to regulate rates is a police power, and that, therefore, the City could not be invested with power to bind itself by an irrevocable contract not to regulate rates, it is not in harmony with the repeated adjudications of this Court.

Los Angeles *vs.* Los Angeles Water Co., 177 U. S., 558.

Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 107.

N. O. Waterworks Co. *vs.* Rivers, 115 U. S., 674.

Now, what is the proper construction of Chapter 104 of the Act of 1877 from which the Water Company derives its powers and the city claims its right to regulate rates? We submit that the proper construction of said Act must be such as will give

effect to all its parts, and that the power to contract and the power to regulate are not repugnant to each other, and that Section 2 must be construed with respect to the power to regulate so as not to destroy and render absolutely nugatory the provisions of Section 1 of said Act granting to corporations organized thereunder the power and right to make contracts and agree upon prices relative to a supply for water and the rates and prices therefor.

Let us consider carefully the provisions of said Act. As hereinbefore shown, the charter of the Water Company was procured, after leave of the City of Knoxville had been obtained, on January 4, 1882, under the provisions of Section 1 of Chapter 104 of the Acts of 1877 (Rec. pp. 52, 54, Appendix No. 1). The second section of said Act of 1877, under which the City claims its power to regulate rates, reads as follows:

> "*Be it further enacted*, That such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village in which it is proposed to operate such waterworks, and such leave shall be certified by the Mayor or Recorder upon the application and registered with it. And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such company."
>
> See Appendix No. 1.

The concluding portion of said Section 2, as set forth in the opinion of the Supreme Court of Tennessee (Rec. p. 219) is italicised, but the italics are by the Court, and do not appear in the Act itself.

By Section 1 of said Act and the charter of the Water Company, it is provided as follows:

> "*The Company shall have power*, and is hereby authorized to bring into said city a sufficient supply of water by means of pipes, etc., . . . and *to contract with said in-*

habitants and with the corporate authorities of said city or incorporated companies for the use of said water and charge such prices for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water as the directors of the company may from time to time prescribe."

Rec. p. 52.

Further, it was provided:

"That nothing in said charter contained shall be construed to compel the inhabitants of said city to use the water so introduced by said company, or to prevent them from using water obtained in any other way."

Rec. pp. 52, 53.

Following the grant of the charter—namely, on July 1st, 1882—a contract was entered into between the City of Knoxville and the Knoxville Water Company, by which, in paragraph 7, the price of water is fixed, as follows:

"7. Said company will supply private consumers with water at a rate not to exceed five cents per 100 gallons. . . ."

Rec. p. 7.

On April 1, 1895, the Knoxville Water Company established a schedule of rates, rules and regulations in harmony with the provision of the contract above quoted, and in fact provided rates very much lower than the maximum rates stipulated in the contract.

Rec. pp. 87, 91.

On October 20, 1899, the Board of Mayor and Aldermen of the City of Knoxville gave its consent and approval by ordinance of said city to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, under the name of the Knoxville Water Company.

Rec. p. 13.

This ordinance is important, inasmuch as it reaffirmed the water rate fixed by the 7th paragraph of the contract of July

1st, 1882, and adopted the schedule of rates and charges then in force and operation by the Water Company (which was the schedule promulgated April 1st, 1895), in the following language:

> "And provided further, that said consolidated Knoxville Water Company, succeeding, as aforesaid, to all the rights, privileges and franchises of both companies, shall also furnish to the people living in the remaining wards of the City of Knoxville, other than said tenth ward, or who may hereafter live in said remaining wards or such wards as may be hereafter added to the City of Knoxville, filtered and wholesome water, or water equal in quality to the filtered water now being furnished by the said Knoxville Water Company, at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the City of Knoxville, dated July 1st, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company."
>
> Rec. p. 14.

By paragraph 10 (Rec. p. 8) of the contract of July 1, 1882, the period of time and conditions upon which the company was to maintain the waterworks were fixed. It reads as follows:

> "10. Said company will maintain the waterworks herein stipulated to be built, in such condition as may be sufficient and necessary to enable it to comply with its undertakings herein set forth, for the period of thirty years from January 1st, 1883, unless the City shall become the owner of the same within that period, as may be done in the manner hereinafter stipulated."

The manner by which the City had the right to become the owner of the waterworks is fixed in paragraph 3 (Rec. p. 10) of the contract, as follows:

> "And it is hereby mutually agreed and understood that at the expiration of fifteen years from the time hereinbefore fixed for the completion of said waterworks, the city shall have the right, upon giving one year's notice of such purpose and intention, to purchase from said company the waterworks herein provided for, and all the property, rights,

> franchises and privileges thereto belonging, by negotiations, if thus the terms can be agreed upon, or if not, then at any time for a consideration to be fixed and determined by appraisers; and if not purchased at the end of fifteen years, the said works, property and franchises, rights, privileges, etc., may upon the same terms and conditions, and in the same way, be purchased by the city at the expiration of each and every year thereafter. . . ."

Then follows in detail the manner of giving notice and of choosing disinterested appraisers.

And the City of Knoxville, among other grants given, agreed, and bound itself as follows:

> "The City further obligates itself not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the streets, lanes or alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water, for the full period of thirty years from the first day of August, 1883, provided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement."
>
> Rec. p. 9.

Then the city (Rec. p. 11) bound the Water Company not to transfer, set over or assign the said contract so entered into for the construction of said waterworks to any company, corporation or individual, thus making it impossible for the company to sell or transfer said plant to any one except itself.

Hence at the time of the passage of the ordinance in question, the City was in a position to acquire, in the manner fixed by itself, the plant and all of the property of the Water Company, and the Water Company could not sell its property to any one except the City; therefore the stipulation in the contract granting to the Water Company an exclusive franchise during the term of the contract was, under the limitations upon the power of sale, really for the benefit of the City, in whose power the Water Company has been at all times, except as it may be protected by its contracts with the City.

These quotations have been made from the statute, the ordinances and the contracts because they form the basis for the presentation of the question of the proper construction of said contracts and the impairment of the obligations thereof by the ordinance of March 30th, 1901, and thereupon it is respectfully submitted that the following propositions are clearly established:

1. That the charter of the Water Company gave it plenary power to contract with the inhabitants or incorporated companies or the corporate authorities of the City of Knoxville, and to charge such prices for the use of the water as might be agreed upon between them.

2. That by the provisions of the statute (Acts of 1877, Chapter 104, Section 2) authority was conferred upon the City of Knoxville to regulate, by ordinance, the price of water to be supplied by the Water Company.

We respectfully insist that these powers conferred as clearly upon the Water Company as upon the City, are not destructive each of the other, and that it was not intended that the power to regulate should destroy the power and right to contract or *that it was to be exercised notwithstanding a contract expressly or impliedly renouncing that right.* We respectfully insist that the power to regulate was granted to the municipal authorities to be exercised either by a contract fixing terms, or if the Water Company refused to enter into a fair and reasonable contract with the City and its inhabitants, then and then only might the City by ordinance regulate and fix the price of water supplied by the Water Company to the City and its inhabitants. But it must be borne in mind that the Water Company did not refuse to enter into an agreement fixing the price of its water, and that thereupon on the first day of July, 1882, these parties, the company under its charter, the City under its power to regulate, entered into an agreement covering a period of thirty years, *fixing the prices of water.* After the lapse of nearly thirteen years—that is, in April, 1895—the Water Company established a sched-

ule of rates much lower than the maximum rates to which it was entitled under the contract of July 1st, 1882, and thereafter, namely: On October 20, 1899, the City, by ordinance of that date, accepted by the Water Company, reaffirmed and re-adopted (1) the rates provided in the Lonsdale-Beaumont contract as applied to the tenth ward of the City of Knoxville; (2) adopted as reasonable and just the schedule of rates then in force and operation by the Water Company, thus practically limiting, with the consent of the Water Company, the maximum charges to the schedule promulgated on April 1st, 1895.

Now, it will be further borne in mind that until July 27, 1900, and only about nine months after the solemn agreement between the parties on October 20th, 1899, the City authorities had never sought to arbitrarily alter or reduce the rates provided in its several agreements with the Water Company, and had never claimed the right to arbitrarily alter, change or regulate said rates notwithstanding its contracts and without the consent of the Water Company. No right or power to change, reduce or regulate the water rates fixed by the contract of July 1, 1882, or by the ordinance-contract of October 20th, 1899, was reserved by the terms or provisions of said contract; nor is any such right or power reserved or provided for in the charter of the Knoxville Water Company. The only source from which such right or power can be claimed is the provision of the statute of 1877, Ch. 104, Sec. 2, namely: "Such corporate authorites shall have power, by ordinance, to regulate the price of water supplied by such Company;" and therefore we respectfully but confidently submit that the corporate authorities by entering into their several contracts with the Water Company, exercised and exhausted their power to regulate rates for the use of water, and that, excepting with the consent of the Knoxville Water Company, the other party to said contracts, such rates cannot be reduced or changed in any manner whatever, but are valid and binding until the expiration of said contracts. Such action upon

the part of the corporate authorities in fixing and agreeing upon rates with the Water Company as late as October 20, 1899, is a recognition of the reasonableness and justness of these rates.

Further, the water supply as provided by these several contracts, was obtained only upon the faith of the Water Company in the binding and irrevocable character of those agreements, and especially of the rates therein provided. The rate is among the most material and important of the terms and conditions which were imposed by the City in consideration of its consent to the Water Company to do business and lay down its pipes within the corporate limits of said City, and afterwards to consolidate itself with the Lonsdale-Beaumont Company. It was a subject for grave consideration and conference between the parties, and when determined by mutual agreement, as was done on July 1st, 1882, and again on October 20th, 1899, the charge would naturally be regarded as fixed until another rate was adopted by like agreement. If such were not the case, what city could persuade parties to invest their capital in improvements which to be profitable must either be permanent or continue for such a length of time as to enable the investor to receive some return upon the amount invested by him. A different construction would be disastrous to the interests of the City.

> Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1, 20.

The principles announced in the case of Detroit *vs.* Detroit Citizens Railway Co., 184 U. S., 368, are applicable to this case, and unless there is a distinction made in the construction of the language of the respective statutes upon which the subject of establishing fares or rates, there is practically no difference in the cases. In the Detroit case, the statute provides that the rates of toll or fares shall be established by agreement between the Company and the corporate authorities, whereas in the case at bar the statute provides that the corporate authorities shall

have power, by ordinance, to regulate rates, and also invests the Water Company and the City authorities with power to agree upon rates, and the Water Company with power to furnish water at such prices as may be agreed upon; and the City authorities, acting under the statute, agreed and contracted with the Water Company to supply water for a period of thirty years, and as a material and essential part of said contract fixed and agreed upon rates for such supply of water, with the right reserved to buy said plant and property and a prohibition against the transfer thereof to any one excepting itself, in accordance with a reservation in said contract. The opinion in the Detroit case (*supra*), page 382, holds, upon the authority of a long line of decisions, that there can be no question as to the competency of a State Legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract for rates or fares and bind thereby any future common council from altering or in any way interfering with such contract, and that the contract once having been made, the power of the City over the subject, so far as altering the rate or fare, or other matters properly in and being a part of the contract, is suspended for the period of the running of the contract.

In City Railway Company *vs.* Citizens Street Railroad Co., 166 U. S., 557, cited in the above case, at page 387, Mr. Justice Peckham says:

> "Athough in that case there was no provision in the statute directing that the rates of fare should be established by agreement, yet nevertheless it was held that the language used amounted to an agreement upon the subject matter which could not be altered during its continuance by either party."

It is submitted that the Detroit case sustains the contention here—nanely, that when the Mayor and Aldermen of Knoxville, under the authority of the City authorizing them to agree upon the price of water or to regulate the price of water by ordinance,

not by ordinances from time to time, carried out their authority by entering into a contract with the Knoxville Water Company, to run for a period of thirty years, without reserving any right in the contract or in the ordinance upon the subject to alter or regulate such rate, that the contract is an absolute one between the parties for the period of time fixed, and not subject to change or alteration by one party without the consent of the other party. Mr. Justice Peckham says upon this point, and it applies to this case:

> "The fixing of rates is, as we have already said, among the most vital portions of the agreement between the parties contained in the ordinances. It cannot be supposed for one moment with regard to a right so fundamental in its nature that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary success of the company," etc.
>
> Detroit *vs.* Detroit Railway Co., 184 U. S., 398.

Therefore, we confidently submit that this question is not "balanced in doubt," and that it is clearly established that the City has contracted away its power to regulate or by the exercise of that power has suspended it for the remainder of the contract period. When we consider the situation of the parties, the surrounding circumstances and the entire statute, we are compelled to this conclusion. The City was "the master of the situation." If the Water Company refused to enter into an agreement respecting reasonable prices for water, then, without its consent, the City might exercise this power to regulate, limited only by what would be unreasonable and oppressive; but if the City should exercise the power vested in it both to contract and regulate and enter into a contract and agreement with the Company for the use of water and agree upon prices for the use of such water, then it became bound by that provision of the Constitution of the United States which is written into every contract that it is sacred from alteration, change or impairment except with the consent of the other party.

III.

IN ANY EVENT, RATES ESTABLISHED BY THE CITY MUST BE SHOWN TO BE REASONABLE.

If it be held that, notwithstanding its contracts and those of its inhabitants, with the Water Company, that the City under Section 2 of Chapter 104 of the Acts of 1887, has a continuing power to regulate, then we insist that, upon the facts of this case, the burden is on the City *to show* that the *rates* which it has *previously agreed upon* and which it desires to regulate *have become unreasonable*, and that the rates which it seeks to ordain in lieu of the such rates are reasonable. In other words, the power to regulate can only operate either in the absence of a rate or upon an unreasonable rate, and if a reasonable rate be in force, then there is no reason why the City should exercise the power which is given it only to assure to the City and its inhabitants a reasonable charge or rate for water. We assume the answer to this proposition will be that when by ordinance the City has enacted a schedule of rates that the same will be presumed to be reasonable, but then it must be borne in mind that the rates sought to be enforced by the ordinance in question are identical with those set forth in the ordinance of July 27, 1900, passed only nine months after the ordinance-contract of October 20, 1899, became effective, and which, being assented to by the Water Company, became part of the contracts existing between the parties, and definitely fixed the rates to be thereafter charged by the Water Company for water; and if any presumption as to reasonableness arises from the mere enactment of an ordinance or the agreement of the parties, then certainly the rates ordained and agreed upon on October 20, 1899, must be presumed not only to have been reasonable, but upon well established principles, to continue reasonable until the contrary is shown.

The ordinance of October 20, 1899, however, assented to by the Water Company, may be looked upon as an Act to regulate, and the presumption of reasonableness, even according to the contention of the City, must attach to it. Will this Court say that nine months later, over the protest of the Water Company and without any showing that conditions have changed, the City may again reduce rates? Would not such action be an unwarranted, unreasonable and arbitrary exercise of a power given to be exercised in a reasonable way upon an unreasonable rate? And here we distinguish the case at bar from the Freeport case so much relied upon by the City in the Court below. In that case the Water Company admitted that the rates sought to be enforced by it "were unjust, unreasonable and oppressive," and that the rates sought to be enforced by the City of Freeport were "just and reasonable," therefore the City of Freeport was only seeking to exercise its power to regulate against an unreasonable and oppressive rate and establish in lieu thereof one which the Water Company admitted was just and reasonable.

> Freeport Water Company *vs.* Freeport City, 180 U. S., 590, 600.

And now, in conclusion, we ask the indulgence of the Court to permit us to quote from the opinion of Meyer *vs.* Brown, 65 Cal., 583, as found in Los Angeles Water Co. *vs.* City of Los Angeles, 103 Fed. Rep., 511, as follows:

> "It is occasionally well to recall the fact that there is no more reason to permit the municipal government to repudiate its solemn obligation, entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other."

Therefore, we confidently submit that the ordinance of March 30, 1903, is void because it impairs the obligations of the contracts between the Water Company and the City, in violation of

Article I, Section 10 of the Constitution of the United States, and because by it the Water Company is deprived of its property and liberty without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

CHARLES T. CATES, JR.,
Attorney for Plaintiff in Error.

HEBER J. MAY,
Of Counsel.

APPENDIX No. 1.

CHAPTER CIV.

AN ACT to amend an Act entitled "An Act to provide for the organization of corporations," approved March 23, 1875, and grant charter to water companies.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the form of charter for a water company shall be as follows: "State of Tennessee. Charter of Incorporation. Be it known, that (here insert the names of five or more persons not under twenty-one years of age) are hereby constituted a body politic and corporate by the name and style of (here insert the name of the company). The general forms, etc., of said corporation are (here insert the general powers, etc., as directed in Section 5, Act March 23, 1875). The business of said company shall be to establish and construct waterworks in or near the town, city or village of (here insert the name), and it shall be the duty of said company to build, furnish and equip waterworks of sufficient capacity to furnish the corporate authorities and inhabitants of said town, city or village with water. To enable the company to establish such works they are hereby authorized and empowered to lay down pipes through the streets, lanes and alleys of said town, city or village, in such manner, however, as to produce the least possible inconvenience to the town, city or village, or its inhabitants, or to travelers, and to take up pavements and sidewalks; *Provided* they shall repair the same with the least possible delay.

Form of charter.

Waterworks.

Authority to lay pipes.

The company shall have power and are hereby authorized, to bring into the said town, city or village a sufficient supply of water by means of pipes or tanks, or in any other way, and to construct reservoirs for the reception thereof, and to supply with water the inhabitants of said town, city or village, and the environs thereof, and all who may be along the line of said companies' pipes, and of erecting hydrants or fire-plugs within the said town, city or village, and to contract with said inhabitants and with the corporate authorities of said town, city or village, or any incorporated companies, for the use of said water, and charge such price for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water as the directors of said company may from time to time prescribe. The works and operations of said

Hydrants, etc.

Charges for water.

Works.

company shall be so constructed and managed that no annoyance shall accrue therefrom to the health and comfort of the inhabitants of said town, city or village, and nothing in this Act shall be so construed as to absolve the company, its officers or agents, from any legal proceedings to restrain or abate any nuisance arising from such waterworks or operations.

Penalty for injury to pipes, etc.

If any person or persons shall injure or destroy any portion of the water pipes or other property belonging to said company, or shall wilfully open a communication into the street or other water pipes, or let on water after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceeding, and also a penalty not exceeding five hundred dollars, upon conviction before a Court having jurisdiction of the offense. If any person or persons shall take or use any of the water of said company for domestic or other purposes without having previously contracted for the same with the officers of said company, such person or persons shall forfeit and pay to the said company the sum of fifty dollars, to be recovered before any Justice of the Peace in the same manner as other debts are collected by law; *Provided*, that nothing herein contained shall be construed to compel the inhabitants of said town, city or village to use the water so introduced by said company, or to prevent them from using water obtained in any other way. If any person or persons shall wilfully corrupt or permit anything to run into or fall into any stream or reservoir from which the said company shall take water to be introduced into said town, city or village, which shall corrupt the same, or to render it unpalatable, unwholesome or unfit for domestic or manufacturing use, or for the supplying of stationary or locomotive engines, or shall bathe in any dam or reservoir, lead or enter any animal into the same, on being convicted thereof before any Justice of the Peace of the civil district in which said water is situated, shall pay a fine of not less than ten nor more than fifty dollars, one-half to the use of the informer, the other half to the use of said company, and shall moreover remain liable to said company for all damages.

Using water without license.

Penalties for injury to the water.

Leave of corporation.

SEC. 2. *Be it further enacted*, That such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village in which it is proposed to operate such waterworks, and such leave shall be certified by the Mayor or Recorder upon the application, and registered with it. And this Act is in no way to interfere with

or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company.

SEC. 3. *Be it further enacted*, That said Act approved March 23, 1875, be and the same is hereby further amended so that all corporations shall have obtained, or that may hereafter obtain charters under section 11 of said Act of 1875, shall in addition to the powers specified in said Act, also have power to raise, buy, sell and deal in agricultural products, operate flouring and other mills, and deal in merchandise. **Merchandising and milling powers.**

SEC. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

EDWIN T. TALIAFERRO,
Speaker of the House of Representatives.

HUGH N. McADOO,
Speaker of the Senate.

Approved March 27, 1877.

JAS. D. PORTER,
Governor.

APPENDIX No. 2.

CHAPTER 115.

AN ACT to amend an Act entitled an Act to provide for the organization of Corporations.

Water companies.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Chapter 142 of the Acts of 1875, entitled An Act to provide for the organization of corporations, approved March 23, 1875, be and the same is hereby amended so as to embrace the organization of water companies.

SEC. 2. *Be it further enacted*, That the form of charter for a water company shall be as follows:

Form of charter.

Be it known, that (here insert the names of five or more persons above the age of twenty-one years) are hereby constituted a body politic and corporate by the name and style of (here insert the name of the corporation), for the purpose of establishing and constructing waterworks (adjacent to, or in the city or town, as the case may be), and it shall be the duty of said company to build waterworks and machinery in or adjacent to said city or town and of sufficient capacity to supply said city and the inhabitants thereof with a plentiful supply of water, and for this purpose said company is hereby authorized and empowered and invested with the privilege to lay down pipes and to extend aqueducts and conductors through all or any of the streets, lanes, alleys of (said city or town), and to supply the inhabitants of said city or town with water by public works. And for the purpose of laying down such pipes, aqueducts and conductors, may take up the pavements or sidewalks upon such street after permission has been first obtained from the taxing district authorities in corporate towns or cities; *Provided*, that said pavements and sidewalks shall be taken up in such manner as to give the least inconvenience to the inhabitants of said city or town), and that the same shall be replaced with all convenient speed by, and at the expense of, said company in as substantial a manner as found before taken up.

SEC. 3. *Be it further enacted*, That the works and operations of such company shall be so constructed and managed as not to affect the health or comfort of (said city or town, as the case may be) prejudicially; and nothing in this Act shall be so construed as to absolve the said company or companies organized hereunder from legal proceedings to restrain or abate any nuisance arising from their operations.

SEC. 4. *Be it further enacted*, That if any person shall injure or destroy any portion of the fixtures or works, or property of the company or companies organized under this Act, such person or persons shall be liable to the company for all damages sustained in consequence of such act or injury.

SEC. 5. *Be it further enacted*, That said company or companies organized hereunder, are hereby empowered and authorized to condemn and take such lands as may be necessary for the establishment of their reservoir and works, and the right of way through all lands between their reservoir and the (said city or town, as the case may be) to lay their pipes, aqueducts or conductors, and keep the same in repair, is hereby granted said corporations or companies; *provided*, that such pipes and conductors shall be laid in such manner as to do as little injury to the property of private persons as possible; and, *provided further*, that said company shall make compensation to the owners of the real estate condemned or taken, or through which the pipes, conductors or aqueducts may be laid. If the owner and company cannot agree upon the amount of compensation which should be paid, the same shall be assessed in the manner provided by the Code of Tennessee, Sections 1325 to 1348.

SEC. 6. *Be it further enacted*, That said corporations or companies are hereby vested with all the powers and privileges and governed by the restrictions incorporated in Section 5 of said Act approved March 23, 1875 (here insert the power as contained in said Act and section), (being Act of 1875, Chapter 142).

Board of inspectors.

SEC. 7. *Be it further enacted*, That said company or corporation that may be organized under this Act, before they shall exercise any of the rights, powers and privileges herein granted, in order to secure a bountiful supply of good, pure and wholesome water, shall first apply to the authorities of the said city or town for the appointment of a board of inspectors to be composed of seven members, who are to be citizens and freeholders of said city or town, three of whom shall be chosen from the medical profession, if practicable. Said board so chosen, after being duly sworn shall make and file their report with the authorities of said town or city, stating therein from what source or sources said water supply shall be obtained; a report of the majority of the members composing said board shall be filed with said city or town authorities, and the same shall be conclusive as to the cause and quality of said water supply.

Report of inspectors.

SEC. 8. *Be it further enacted*, That said board shall, within ten days after their said appointment and qualification,

file their report (duly sworn to) with said town or city authorities.

SEC. 9. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 4, 1885.

C. R. BERRY,
Speaker of the Senate.

J. A. MANSON,
Speaker of the House of Representatives.

Approved April 9, 1885.

WM. B. BATE,
Governor.